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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

Nos. 101 and 102

CITY OF CHICAGO, ET AL., APPELLANTS

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

CITY OF CHICAGO, ET AL., APPELLANTS

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEES.

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BRIEF FOR CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEES.

QUESTION PRESENTED.

Where, after hearing in an investigation of the kind contemplated by Section 13a(1) of the Interstate Commerce Act, the Interstate Commerce Commission concludes not to issue an order requiring the continuance

of operation of a passenger train, in whole or in part, for a period of not to exceed one year, is the Commission's conclusion not to issue such an order subject to judicial review?

STATEMENT.

On August 31, 1967, appellee Chicago & Eastern Illinois Railroad Company (C&EI) gave notice to the Interstate Commerce Commission (Commission), pursuant to Section 13a(1) of the Interstate Commerce Act, that effective October 1, 1967, it would discontinue its passenger trains Nos. 54 and 93, which operated between Chicago, Illinois, and Evansville, Indiana. On September 18, 1967, the Commission, under the provisions of Section 13a(1) of the Interstate Commerce Act, instituted an investigation into such discontinuance, and on January 31, 1968, the Commission, having concluded not to issue an order requiring the continued operation of the trains, discontinued its investigation. The trains were, accordingly, discontinued. Action was thereafter filed by certain of the appellants in the court below seeking to set aside the Commission's conclusion to discontinue its investigation. The action was dismissed on January 8, 1969, for want of jurisdiction in the court below to review the Commission's action. *City of Chicago* v. *United States,* 294 F. Supp. 1103 (N. D. Ill. 1969).

On April 3, 1968, appellee Louisville and Nashville Railroad Company (L&N) gave notice to the Commission, under Section 13a(1) of the Act, that, effective

May 7, 1968, it would discontinue its passenger trains Nos. 6 and 7, which operated between Cincinnati, Ohio, and New Orleans, Louisiana. The Commission on April 24, 1968, instituted an investigation into such discontinuance. The Commission, concluding that it would not issue an order requiring the trains to be continued in operation, discontinued its investigation on September 6, 1968, but, on that day and before L&N discontinued operations of Nos. 6 and 7, some of the appellants herein filed a complaint in the court below in an attempt to set aside the Commission's decision. They also sought, and obtained, a temporary restraining order, without bond, requiring L&N to continue operation of the trains until further order of the court.[1]

On January 8, 1969, the court below dissolved that restraint and dismissed the complaint. *Tennessee Public Service Commission* v. *United States,* 294 F. Supp. 1106 (N. D. Ill. 1969). On the same day, the court below refused to reimpose the restraining order pending hearing of the appeal to this Court. The trains were thereupon discontinued.

On the following day, January 9, 1969, appellants applied to Mr. Justice Marshall for a stay. It was denied by him on January 13, 1969.

This Court on June 16, 1969, noted probable jurisdiction. The C&EI case (No. 101) and the L&N case (No. 102) were consolidated because they involve the same question.

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[1]The effect of the restraining order was to extend beyond the statutory four-month suspension period the date for the discontinuance of trains Nos. 6 and 7. *Cf. Arrow Transp. Co.* v. *Southern R. Co.,* 371 U. S. 658 (1963).

SUMMARY OF ARGUMENT.

The authority for a carrier to discontinue an interstate passenger train comes expressly from the statute and not from any action of the Commission. Under Section 13a(1) the carrier has the right to discontinue the train upon the filing of a 30-day notice, unless the Commission enters upon an investigation. If the Commission enters upon an investigation, discontinuance is postponed for not more than four months and the carrier can, under the statute, discontinue the trains at the end of such four-month period, unless the Commission orders continued operation of all or part of the train for a period not to exceed one year. Such order of continued operation can be made only if the Commission first finds that public convenience and necessity require continued operation and that continued operation will not unduly burden interstate or foreign commerce. Thus, the statute is self-implementing, the authority to discontinue coming from the statute and not any Commission order or action, and the Commission itself has properly so held. *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59 (1959).

The intent of Congress in enacting Section 13a(1) in 1958 would be completely frustrated if judicial review of a train discontinuance were allowed. The railroads were in dire financial straits, occasioned in part by the fact that state regulatory bodies (the agencies then having jurisdiction over discontinuance of all passenger trains) were delaying unduly the dis-

continuance of unneeded and costly interstate passenger trains, resulting in heavy drains on the finances of the carriers. In enacting Section 13a(1), Congress placed a five-month maximum period from the date of filing of a notice of discontinuance by the carrier as the maximum time within which the carrier would be required to continue unneeded and costly trains. If judicial review were to be granted, and the *status quo* maintained *pendente lite,* the five-month suspension period would be stretched to a year or more, causing the carrier to continue a train well past the period intended by Congress. *Cf. Arrow Transp. Co.* v. *Southern R. Co.,* 372 U. S. 658 (1963), *supra.*

Assuming *arguendo* that Commission orders are involved in the cases at bar, no right to, or obligation upon, appellants flows from Commission action and, accordingly, they are not entitled to judicial review. *I.C.C.* v. *Atlantic Coast Line R. Co.,* 383 U. S. 576, 602 (1966). This Court has held that protestants to a discontinuance are not entitled to judicial review if the Commission does not investigate such discontinuance. *Bergen County* v. *U. S.,* 359 U. S. 27 (1959). Likewise, appellants are not entitled to review of a discontinuance of an investigation, since no rights accrue to and no obligation is placed upon appellants in such instance. To the extent that state regulatory bodies previously had rights in discontinuances of interstate passenger trains, such rights were extinguished by the enactment of Section 13a(1) and a limited veto power was placed in the Commission, which now represents the public.

As the discontinuance of an investigation does not result in any "order" within the meaning of 28 U.S.C. 1336(a), the appellants are not entitled to judicial review. The authority to discontinue a train after investigation, like authority to discontinue a train where no investigation is held, comes from the statute and not any order of the Commission. Thus, regardless of any label placed on its notice of discontinuance of the investigation by the Commission, no order results which entitles appellants to judicial review. *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309 (1927).

Under the provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 701), no judicial review is available when, as in the cases at bar. agency action is committed to agency discretion. To the limited extent that Congress granted to the Commission power to veto an interstate train discontinuance, such power is committed, unquestionably, to the sole discretion of the Commission. Whether to investigate a discontinuance is at the sole discretion of the Commission, which, the Government says, depends on the existence of a "substantial question." Clearly, then, the provisions of Section 10 of the Adminstrative Procedure Act proscribe judicial review of the cases at bar.

ARGUMENT.

1. The Concept of Judicial Review Is Contrary to the Language of the Statute.

The statute grants to the carrier, upon filing of the prescribed 30-day notice, the right to discontinue the train at the end of the notice period, unless the Commission enters upon an investigation of the proposed discontinuance and serves an order on the carrier at least ten days before the end of the notice period requiring the train or some part thereof to be continued in operation for not more than four months. After hearing conducted in the course of the investigation, the Commission may order the continuance or restoration of operation of the train for a maximum period of one year, only if it finds that the operation of the train "is required by public convenience and necessity *and* will not unduly burden interstate or foreign commerce." (Emphasis added.)

Thus, if the Commission does nothing within the 30-day notice period or decides not to investigate, the discontinuance of the train takes effect automatically (at carrier's option) by operation of the statute at the end of the carrier's 30-day notice period. Likewise, if the Commission does investigate but fails to conclude its investigation within the four-month suspension period, the discontinuance also takes effect by operation of the statute, not by Commission action. The same is true if the Commission terminates the investigation within the four-month period.

The Commission has properly recognized that the statute is self-implementing and that the authority for the railroads to discontinue interstate trains comes not from Commission action but from the statute itself. In *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59 (1959), *supra,* the Commission held (pp. 75-76):

> "The authority for such discontinuance flows directly from the statute and not from any action by us. The powers vested in us are strictly limited by the statute. We may order the operation continued, but not more than 4 months, pending an investigation; and upon completion of the investigation we may order continuance or restoration of the operation only if we find affirmatively that the operation of the train or ferry (1) is required by the public convenience and necessity and (2) will not unduly burden interstate commerce.
>
> "We are given no discretion to 'approve' or 'disapprove' a proposed discontinuance under the provisions of section 13a(1). Our duty is, in appropriate cases, to investigate the facts, and only if such investigation warrants the findings specified in the statute may we require a railroad to continue or restore the service which is the subject of the investigation."

Similarly, in *New York, N. H. & H. R. Co. Discontinuance of Trains,* 327 I.C.C. 151, 217 (1966), the Commission, by Vice Chairman Tucker, spoke of "the unique provisions of section 13a(1), a self-implementing statutory provision."

In an effort to support their argument, appellants and the Government, realizing that any order of the Commission issued under Section 13a(2) is subject to judicial review, say that since paragraphs (1) and (2) of Section 13a are alike in their statutory standards, they must be treated alike for purposes of the issue at bar.

Besides the fact that such argument lacks logic, there is a serious question whether the statutory standards are alike, notwithstanding this Court's *dictum* in *Southern R. Co.* v. *North Carolina,* 376 U. S. 93, 103 (1964). Under Section 13a(2), before the Commission may authorize an intrastate train to be *discontinued* it must find: (1) public convenience and necessity *permit* of such discontinuance, and (2) continued operation would constitute an undue burden on interstate operations or commerce. Under 13a(1) the Commission can require *continued* operation of the trains for a period not exceeding one year only if it finds: (1) public convenience and necessity *require* continued operation and (2) continued operation will not constitute an undue burden on interstate or foreign commerce. Thus, putting to one side the other differences obvious from the different language used in the two sections, under 13a(2) *both* statutory findings must be met before a train is discontinued, while under 13a(1) the train may be discontinued by operation of the statute if the Commission makes only one of the two findings or if it makes neither. In any event the statutory-standards issue is not germane to the issue of judicial review.

The clear differences in the way that Congress drafted the two paragraphs of Section 13a is what establishes its intention that cases under Section 13a(1), such as the cases at bar, shall not be reviewable. Section 13a(2) provides that a carrier "may petition the Commission for authority to effect [a] discontinuance" of an intrastate train, if the state authority having jurisdiction has ruled unfavorably or has not ruled within 120 days of the filing of the application by the carrier. If such petition is filed, the Commission must notify the Governor of the State in which the train operates, *must* conduct "a full hearing" in that state, and then the Commission *may grant* such *authority* only upon findings by it that public convenience and necessity permit the discontinuance and that continued operation will constitute an undue burden.

By contrast, under Section 13a(1) the railroad does not apply for any *authority* from the Commission. The carrier discontinues the train at the end of the 30-day notice period (or not later than four months thereafter if the Commission orders the train to be continued while it investigates), unless the Commission, after hearing, orders continued operation for a period not exceeding one year. Clearly, in a 13a(2) case discontinuance stems solely from a Commission order, whereas under Section 13a(1) the discontinuance comes directly from the statute.

A further and exceedingly important distinction between Section 13a(1) and Section 13a(2) lies in the difference in procedures. With respect to an intrastate train, the railroad cannot apply to the Com-

mission unless the state commission has ruled unfavorably to the railroad or has not ruled within 120 days following the filing of the application. Thereafter, a petition to the Commission may be presented by the railroad, and a hearing must be held. Thereafter, briefs to the hearing examiner may be filed. Thereafter, the examiner issues his recommended report and order to which exceptions may be taken. Thereafter, a division report would be issued and, perhaps, thereafter, a petition for reconsideration of the division's report and order could be filed. The procedural steps in a Section 13a(1) case are clearly not analogous to those in a Section 13a(2) case and the substantially greater period entailed in proceedings under 13a(2) make the procedural difference of greater practical importance, particularly where the carrier providing the interstate service is losing substantial sums of money on the operation. Congress' different and more deliberate approach to intrastate discontinuances than to interstate discontinuances is understandable, because as to the former discontinuances Congress was giving the Commission power over operations of a local character.

If appellants and the Government wished to draw an appropriate analogy between Section 13a(2) and another provision of the Interstate Commerce Act, they should have compared it with Section 1(18)-(20) of the Act. Under each provision, the carrier is not entitled to take *any* action unless and until it is first *authorized* by the Commission to do so. The right of the carrier to do the things covered by Section 13a(2) and

Section 1(18)-(20) flows only from affirmative Commission action and appropriate Commission order, not from the statute itself as in the case of Section 13a(1).

The Commission in *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59 (1959), *supra,* recognized the great and controlling distinctions between Section 1(18) and Section 13a(1), holding (p. 75):

> "The powers vested in us by section 1(18-20) bear only slight resemblance to those vested in us by section 13a(1). The former section requires as a condition to abandonment that a railroad secure a certificate of public convenience and necessity from this Commission, that the application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as we may from time to time prescribe, that we shall have power to issue such certificate as prayed for, or to refuse to issue it, and that we may attach to the issuance of the certificate such terms and conditions as in our judgment the public convenience and necessity may require."

It is significant that a number of bills providing for judicial review of passenger-train discontinuances under Section 13a(1) have been introduced in Congress since the enactment of that Section. For example, H. R. 18212 and S. 3861, introduced in June of 1968 in the second session of the 90th Congress, each contained the following provision:

> "13a(3) Any State, administrative or regulatory agency of a State, or person, adversely affected or aggrieved by an order of the Commisison en-

tered pursuant to paragraph (1) or (2) of this section, may bring suit to obtain judicial review thereof under those provisions of law applicable in the case of suits to enjoin, suspend, or set aside orders of the Commission."[1]

If existing law provides for judicial review of a Commission discontinuance of an investigation under Section 13a(1), there would be no need whatever to add the above-quoted language to the statute.

Had Congress wanted judicial review of all Section 13a(1) matters, it could have simply tracked the language of Section 13a(2) when it enacted both sections in 1958. It did not do so. It did not so intend.

2. Congress Intended a Prompt and Effective Way to Meet a Critical Problem.

Before the enactment of Section 13a(1) of the Interstate Commerce Act in 1958, the railroads were without adequate remedy in their attempts to discontinue unneeded and costly interstate passenger trains. They were relegated to the piecemeal approach of seeking authority from each of the state regulatory agencies through which the trains operated. This often resulted in endless delays in obtaining the necessary authority from one or more of the state agencies or in the outright denial of the discontinuance proposals. Thus, the railroads were required to continue for extended periods of time the operation of interstate passenger

[1]The inclusion within the scope of the bills of orders under Section 13a(2) must be attributed to a desire for complete uniformity rather than to necessity.

trains which the traveling public had virtually deserted and which, according to estimates of the Commission, resulted in a $700 million annual deficit for the railroads of the country. [H. Rep. No. 1922, 85th Cong. 2nd Sess. (1958), 1958 U. S. Code Cong. and Admin. News, pp. 3467-3468].

When Section 13a(1) was enacted the railroads were in an "exceedingly perilous financial condition," unable to continue to absorb the devastating losses from passenger operations (104 Cong. Rec., p. 12543). Some railroads were on the brink of bankruptcy (104 Cong. Rec., p. 12527), and Congress recognized that something must be done quickly in the legislative area if railroads were to continue as a needed transportation agency (104 Cong. Rec., pp. 12539-12540).

These, then, were the circumstances leading up to the enactment of Section 13a(1). The worsening railroad condition called for immediate corrective legislation which would prevent the state agencies from unduly delaying the discontinuance of little-used and costly passenger trains.

Appellants and the Government suggest that Congress was concerned only with delays in proceedings in the states, not with delays before the Commission and the federal courts, when it enacted Section 13a(1) (appellants' brief, pp. 10-11; Government's brief, p. 19). Such an argument is baseless. Congress was concerned with delays encountered by the railroads in ridding themselves of unneeded trains, and it would be ridiculous to suggest that Congress merely changed the forum for such delays by enacting Section 13a(1).

The Government also says that the policy of avoidance of delays can be "sufficiently implemented" in review proceedings before the district court (Government brief, p. 19). Such contention does not square with reality. If a right to judicial review is recognized, a district court is likely to be persuaded by an argument in favor of maintaining the *status quo* until the matter can be heard on the merits. There then follow: the filing and disposition of the opponents' petition for reconsideration before the Commission; completion of the pleadings in court; action on preliminary motions; filing of extensive briefs on the merits; and, finally, hearing and decision by the three-judge court. In No. 102, more than nine months passed between the L&N's notice of intention to discontinue train service and the actual discontinuance of the train upon the dissolution of the district court's temporary restraining order. Indeed, if appellants' application to this Court for a stay had been granted the trains would still be operating and losing about $1 million annually (Appendix, p. 57), and the L&N would be without protection of any bond.

This is no isolated instance. For example, see also *City of Williamsport* v. *United States,* 273 F. Supp. 899 (M. D. Pa. 1967), 282 F. Supp. 46 (M. D. Pa. 1968). The facts of that case show that notice of discontinuance was filed in January, 1967, a temporary restraining order was issued in May, 1967, and the complaint was dismissed on the merits in March, 1968. There is no indication in the opinion that the restraining order was dissolved prior to March, 1968. Like-

wise, in *City of Chicago* v. *United States,* 300 F. Supp. 115 (N. D. Ill. 1969), the notice of discontinuance was filed on June 14, 1968, a temporary restraining order was issued on November 15, 1968, and on June 2, 1969, the Commission's decision was affirmed and the restraining order was dissolved.

Clearly, the legislative intent to eliminate delays is not "sufficiently implemented" if appellants' and the Government's contentions for judicial review are accepted. By the enactment of Section 13a(1), Congress provided for the elimination of interstate trains no later than five months after notice is filed, unless continued operation is required by public convenience *and* does not constitute an undue burden.[1] If Congress had intended a longer period than five months, it would have followed the language of Section 13a(2). *Cf. Arrow Transp. Co.* v. *Southern R. Co.,* 372 U. S. 658, 664 (1963), *supra,* wherein this Court, in discussing the Commission's seven-month suspension power under Section 15(7), held:

> "It cannot be said that the legislative history of the grant of the suspension power to the Commission includes unambiguous evidence of a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates. However, we cannot suppose that Congress, by vesting the new suspension power in the Commis-

[1] If no undue burden exists as to a proposed discontinuance, then the continued operation would, of course, have no materially adverse effect on the financial condition of the carrier, the issue with which Congress dealt when it enacted Section 13a(1).

> sion, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head."

Appellants and the Government would transform a statute which expressly permits only a five-month delay in a discontinuance into a procedure which sanctions delays of one to one and one-half years, or more, even though the Commission has determined and the three-judge court ultimately determines that the discontinuance is proper. Such a transformation can only be described as a frustration of the overriding purpose of Congress in enacting Section 13a(1).

3. Appellants Are Not Entitled to Review Because Section 13a(1) Does Not Grant a Right to Them or Impose Any Obligation Upon Them.

As this Court stated in *I.C.C.* v. *Atlantic Coast Line R. Co.,* 383 U. S. 576, 602 (1966), *supra:*

> "Recent decisions of this Court have recognized that Commission orders determining a 'right or obligation' so that 'legal consequences' will flow therefrom are judicially reviewable."

And so, even assuming *arguendo* that Commission orders are involved in the cases at bar, inquiry must be made to determine whether any right or obligation of appellants flows from agency action.

Clearly, there is none. The discontinuance of the investigations by the Commission simply enabled the railroads to exercise the authority granted by statute.

The discontinuances did not compel appellants to do anything nor did such "orders" create any right in appellants. This was recognized by the district court in *State of New Jersey* v. *United States,* 168 F. Supp. 324 (N. J. 1958), *aff'd. sub. nom., Bergen County* v. *U. S.,* 359 U. S. 27 (1959), where, in discussing the interests of state and local authorities, the court held (p. 334):

> "The discontinuance of service by a carrier pursuant to the direct Congressional authorization embodied in Section 13a(1) poses no threat to life, liberty or property."

It further held, discussing the enactment of Section 13a(1) (p. 336):

> "Such congressional action not only extinguishes such [Board of Public Utility Commissioners]—created rights, but also any other public rights which may have resulted from the initial grants of ferry franchises . . ."
>
> * * *
>
> "When Congress enacted Section 13a(1) the rights of the plaintiff-intervenors as well as those of the original plaintiffs became conditional licenses subject to termination through the invocation by the carrier of the procedure prescribed therein."

Appellants and the Government contend that the concept of "fairness" should entitle appellants to review, since a railroad is entitled to review in the event

the Commission orders it to continue operation for a period not exceeding one year.

Such contention was disposed of in the *Bergen County* case, *supra.* That case involved the discontinuance of passenger ferries by railroad under the provisions of Section 13a(1). Appropriate notice of discontinuance was filed by the carrier, and protests were lodged with the Commission by the State of New Jersey and its regulatory body. The Commission, in the exercise of its discretion, elected not to investigate and issued a written notice to the parties to that effect. The ferries were discontinued in accordance with the carrier's 30-day notice. A complaint was filed by New Jersey and others seeking to set aside the Commission's notice and to require the Commission to investigate the discontinuance. The lower court dismissed the complaint in *State of New Jersey* v. *United States, supra,* on the grounds that Section 13a(1) did not permit judicial review. That decision was affirmed *per curiam* in the *Bergen County* case, *supra.*

Thus, the states and communities do not have a right to judicial review under Section 13a(1) where the Commission refuses to investigate the discontinuance. Obviously, the alleged interest of states and communities is as great in the circumstances where the Commission does not investigate as where it does. Accordingly, there is no basis to contend that appellants are entitled to judicial review in the interest of "fairness." Congress has decided, as it has the right to decide, that there shall be judicial review under Section 13a(1) only when the Commission, by

order, interferes with the carrier's right to discontinue which flows directly from the statute.

This Court has, of course, recognized that Congress can determine, absent a constitutional issue, the extent of judicial review, if any. *Labor Board* v. *Cheney Lumber Co.,* 327 U. S. 385, 388 (1946). And although Congress did not have to be "fair" in enacting Section 13a(1) [*State of New Hampshire* v. *Boston and Maine Corporation,* 251 F. Supp. 421, 425 (New Hamp. 1965)], we submit that the interests of all segments of the public are fairly protected under the statutory scheme of Section 13a(1) without procedure for judicial review. The Commission represents the public, *United States* v. *Merchants &c. Ass'n.,* 242 U. S. 178 (1916). Under the provisions of Section 13a(1), it replaces state regulatory bodies as the representative of the public. In determining whether to exercise its limited veto power over interstate train discontinuances, the Commission, however, entertains and fully considers the protests of public bodies, as it did in these cases, in arriving at its ultimate conclusion. It cannot, therefore, be said that the public expressions have not been amply considered when the Commission, acting for the public, discontinues a Section 13a(1) investigation.

4. Discontinuance of the Investigation by the Commission Is Not an Order Within the Meaning of 28 U.S.C. 1336(a).

As we have before shown, the carrier may discontinue operation of the trains, whether or not an investigation is conducted, at the end of the periods described in Section 13a(1), such authority coming directly from the statute and not from any Commission action. Indeed, the statute makes no reference whatever to the issuance by the Commission of any "order" when it does not investigate or when it terminates an investigation. Thus, in the cases at bar, the Commission's utterances, labeled "orders" discontinuing the investigations, are gratuitous and may be characterized as simply "housekeeping" orders.

Had the Commission after the investigation, however, directed the carrier to continue operations for one year, it could only do so by an "order" as the statute expressly provides, because by such an order the Commission would be requiring the carrier to do something contrary to what the statute otherwise grants to the carrier.

Accordingly, it is obvious that the "orders" in the cases at bar are not orders within the meaning of 28 U.S.C. 1336(a). *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309 (1927), *supra,* where this Court held:

> "The final report on value, like the tentative report is called an order. But there are many

orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act."

Appellants and the Government contend that the court below resurrected the "affirmative" versus "negative" order doctrine rejected by this Court in *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125 (1939). Such contention is without merit. In the *Rochester Telephone* case, this Court explained that the "affirmative" and "negative" order doctrine (the former-type order, but not the latter, being subject to judicial review) was based on the issue of whether or not the Commission's order had the legal effect of changing the *status quo* (pp. 140-141, footnote 24). If the Commission's discontinuance of investigations in the cases at bar were properly to be characterized under that discarded doctrine as "orders" they would be "affirmative", not "negative", because the *status quo* would have changed; that is, the trains which formerly operated were not operating after issuance of the Commission's "orders." But *post hoc, ergo propter hoc* is fallacious reasoning. The trains were not discontinued by authority of the Commission's orders. They were discontinued by force of the authority which flowed directly from the statute once the Commission had concluded not to exercise its veto power.

The Government also contends that once the Commission undertakes an investigation it is required by Section 14(1) to make appropriate findings and to issue an order. In response to that contention, it is sufficient to say that the requirements, if any, under

Section 14(1) in no way support the proposition that a Section 13a(1) discontinuance is judicially reviewable. In other words, reviewability exists or does not exist depending upon the statutory scheme of Section 13a(1), not Section 14(1). *Cf. United States* v. *Los Angeles R.R., supra,* where this Court held that a so-called valuation "order" of the Commission was not subject to judicial review notwithstanding that an extensive investigation was conducted by the Commission.

5. Section 10 of the Administrative Procedure Act Bars Judicial Review.

Section 10 of the Administrative Procedure Act [5 U.S.C. 701] deals with judicial review of agency action, and its introductory clause establishes that the cases at bar are not subject to judicial review. In pertinent part, Section 10 provides:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law."

Accordingly, as Professor Davis has stated in *Administrative Law Treatise,* Vol. 4, Section 28.16, p. 80:

> "All of section 10 of the Administrative Procedure Act, dealing with judicial review, is modified by the two parts of the introductory clause, one part of which is: 'Except so far as . . . agency action is by law committed to agency discretion— . . .' Whatever the scope of review prescribed by subsection (e) when read alone, the

> scope of review is narrowed by the introductory clause to the extent that the action is by law committed to agency discretion. For instance, although subsection (e) provides that the reviewing court shall set aside agency action found to be 'arbitrary [or] capricious,' the reviewing court may not set aside arbitrary or capricious action so far as agency action is by law committed to agency discretion. All other clauses of subsection (e) and of the rest of section 10 are similarly modified by the introductory clause."

To the limited extent that Congress granted the Commission power to act to veto interstate passenger train discontinuances, such power is, unquestionably, committed to the sole discretion of the Commission. This is graphically established in the Government's brief (pp. 20-21). First, the Government correctly admits that there is no judicial review if the Commission does not investigate. But, says the Government, if a "substantial question" exists, the Commission investigates and the results of the investigation are subject to judicial review (a conclusion with which we disagree). Thus, the threshold question is what is a "substantial question" and who decides whether one exists? Obviously, it is not the carrier or the opponents to the discontinuance, but the Commission, and it alone, that makes the decision in the exercise of its absolute discretion.[1]

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[1]Interestingly, an analysis of the argument of the Government reveals that it is, in effect, contending that the *Commission* decides whether judicial review is available. That is to say, if the

(Footnote continued on following page)

It is difficult to imagine any matter committed more fully to agency discretion than is the function of the Commission under Section 13a(1). The limited discretionary power vested in the Commission by Section 13a(1) is clearly the type of action "committed to agency discretion by law" contemplated by Section 10(a) of the Administrative Procedure Act, and the exercise by the Commission of its discretion is not subject to judicial review.

Commission decides that no "substantial question" exists, there is no judicial review; but if the Commission decides a "substantial question" does exist, then appellants are entitled to judicial review. Obviously, the Commission has no such power.

CONCLUSION.

For the reasons stated, the judgments of the court below should be affirmed.

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